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FEDERAL COMMUNICATIONS COMMISSION  
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VIA HAND DELIVERY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW, Stop Code 1170  
Washington, D.C. 20554

Re: In the Matter of Streamlining Broadcast EEO Rule and Policies:  
MM Docket No. 96-16

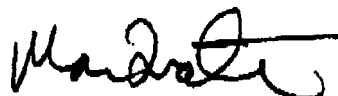
Dear Mr. Caton:

Transmitted herewith by facsimile pursuant to Section 1.52 of the Commission's Rules are an original and six (6) copies of the Joint Reply Comments of the North Carolina and Virginia Associations of Broadcasters in MM Docket No. 96-16.

If any questions should arise in connection with your consideration of this matter, it is respectfully requested that you communicate with this office.

Sincerely,

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.



Marcus W. Trathen  
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MWT/sj  
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cc: Mr. Roy Stewart  
Ms. Paulette Loden

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
Streamlining Broadcast EEO	)	
Rule and Policies, Vacating the EEO	)	
Forfeiture Policy Statement	)	MM Docket No. 96-16
and Amending Section 1.80 of	)	
the Commission's Rules to Include	)	
EEO Forfeiture Guidelines	)	

To: The Commission

**JOINT REPLY COMMENTS OF THE  
NORTH CAROLINA AND VIRGINIA  
ASSOCIATIONS OF BROADCASTERS**

October 25, 1996

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## SUMMARY

The comments filed by broadcasters in this proceeding are remarkable in their uniform support for reform of the FCC's EEO Rule. The comments filed by station owners, the National Association of Broadcasters, and broadcaster's associations from 32 states and the District of Columbia, support the Commission's proposals and, in some cases, recommend further modifications consistent with the goal of eliminating unnecessary administrative requirements while continuing to ensure equal employment opportunities for all.

The Comments demonstrate that broadcasters have come a long way in eradicating discrimination in the broadcast industry. Although the commenters agree that constant vigilance against discrimination is necessary, the opponents of EEO reform have not provided any evidence of institutional discrimination currently existent in the broadcast industry. In fact, recent growth rates of minority and female employees in broadcasting have exceeded the growth rate of women and minorities in the overall workforce -- at a time when employment in the industry has generally fallen.

The opponents of EEO reform argue that the current EEO Rule places no "burden" on broadcasters. However, it is the experience of the commenting broadcasters that many of the current record keeping and reporting requirements are an unneeded and unproductive drain on limited resources and may work positive harm on equal employment efforts. For example, the Texas Association of Broadcasters reports that record keeping and reporting requirements cost Texas broadcasters \$21.3 million in 1994. This is money that could be better used ensuring program diversity, recruiting and training of minorities and women. Moreover, the unintended and

deleterious effect of the current rule is that small broadcasters may refrain from hiring so that they do not exceed the current EEO record keeping threshold.

To alleviate these inefficiencies, the Associations recommend exempting stations with 25 or fewer full-time employees from the record keeping and reporting requirements. Commenting broadcasters agree with the Associations' reasoning, although most commenters recommend the exemption level be at 20 or fewer employees. At that threshold level, 72.3% of total broadcast industry employees would still be subject to the record keeping and reporting requirements.

In addition, the comments demonstrate the need for revision of the alternative labor force criteria. The MSA is not always the appropriate baseline from which to measure the adequacy of minority and female employment because stations often draw their employees from a labor force smaller than the entire MSA or from outside of the MSA. Further, small broadcasters near large metropolitan areas have difficulty competing against larger broadcasters and other industries for qualified minority and female employees.

Additionally, because of the importance of internships and part-time positions as entry level jobs in the industry, broadcasters overwhelmingly recommend awarding credit for hiring minorities and women into those positions. Likewise, the EEO reform opponents recognize the importance of such employment. Especially for small broadcasters, the use of job fairs and centralized job referral sources and databases of state broadcaster's associations are of prime importance to recruiting efforts and should be credited toward the recruiting effort.

Many commenters also support the scaling back of the proposed forfeiture structure used to enforce the EEO Rule. As most commenters agree, the focus of the EEO Rule should be on actual discrimination and not on the fulfillment of paperwork requirements. A broadcaster with a strong

record of equal opportunity in employment should never be subject to a forfeiture for failure to maintain its files in a particular way. The goal is not record keeping, but the promotion of equal opportunity. Form must not be celebrated over substance.

**Before the  
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To: The Commission

**JOINT REPLY COMMENTS OF THE  
NORTH CAROLINA AND VIRGINIA  
ASSOCIATIONS OF BROADCASTERS**

The North Carolina Association of Broadcasters ("NCAB") and the Virginia Association of Broadcasters ("VAB") (collectively, "the Associations"), by and through their undersigned counsel and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, respectfully submit the following reply comments in connection with the Commission's Order and Notice of Proposed Rule Making (the "NPRM"), 11 FCC Rcd 5154 (1996), in the above-referenced docket seeking comment on several proposed revisions to the FCC's EEO Rule and Policies (collectively, "the EEO Rule").

I. INTRODUCTION

It should be emphasized at the outset that the Associations and their constituent members are committed to equal opportunity principles and to the historic purposes of the EEO Rule. Nonetheless, the Associations believe, as stated that in their Comments in this proceeding, that the present EEO Rule has become bogged down by procedural and record keeping requirements which

elevate form over substance and which ignore practical, real world efforts to better the lives of individuals through training and internships.

To address these concerns, the Associations proposed in their Comments that the EEO Rule be amended to allow significantly expanded safe harbors for broadcasters. Specifically, the Associations believe that broadcasters should qualify for an exemption from the EEO reporting and record keeping requirements if: (1) they employ twenty-five (25) or fewer full-time employees; (2) they are licensed to communities which have an available labor force which is less than 10% minority; (3) they participate in qualified job fairs or on-campus recruiting activities; or (4) they participate in qualified internship or training programs. Additionally, the Associations believe that the record keeping requirements with respect to female applicants and employees should be eliminated for all stations.

## II. ANALYSIS

Seldom in the history of FCC rule making have broadcasters been in such consistent agreement as in this proceeding. At least 33 state broadcasters associations (plus the District of Columbia) as well as the National Association of Broadcasters filed comments supporting reform of the EEO Rule. These comments are replete with real-world examples of the inefficiencies and dislocations that are caused by the current embodiment of the EEO Rule. Attached hereto as Exhibit A is a summary of the principal comments filed in this proceeding.



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While the Associations agree whole-heartedly with the observations of MMTC<sup>1</sup> that discrimination is an odious practice that cannot be countenanced by the FCC, the goal of eradicating discrimination is best served by rules which allow broadcasters to efficiently serve their communities and which focus on eliminating discrimination and not on paperwork.

Only those advocates speaking for interested minority groups disagree with the FCC's proposal to "streamline" enforcement of its EEO requirements through more efficient rules. These parties, the self-described "EEO Supporters" (referred to herein as "MMTC"), oppose reform of the EEO Rule by purporting to challenge the motives of those who advocate reform.<sup>2</sup> In fact, MMTC seems to proceed from the presumption that broadcasters are racists and sexists who are hoping that the FCC will avert its gaze so that broadcasters can practice their bigotry. For instance, MMTC's hyperbole reaches its zenith when it asserts that "[t]he abandonment of EEO enforcement will guarantee a resurgence of discrimination and the diminution of the already meager access to the

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<sup>1</sup> The parties filing joint comments in support of the EEO Rule (hereinafter "MMTC") include the following: Minority Media and Telecommunications Council, Office of Communication of the United Church of Christ, National Council of Churches, American Civil Liberties Union, American Hispanic Owned Radio Association, Association of Black Owned Television Stations, Black Citizens for a Fair Media, Black College Communications Association, Chinese for Affirmative Action, Cultural Environment Movement, Fairness and Accuracy in Reporting, Hispanic Association on Corporate Responsibility, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Inc., National Association for the Advancement of Colored People, National Association of Black Owned Broadcasters, National Bar Association, National Hispanic Media Coalition, National Rainbow Coalition, National Urban League, Operation PUSH, and Women's Institute for Freedom of the Press.

<sup>2</sup> MMTC refers to broadcasters' comments in this proceeding as "anti-EEO filings." MMTC Comments at p. 12 n. 21.

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stream of communications by minorities and women."<sup>3</sup> This charge is striking for both its stridence and its complete lack of factual support. In the end, it demonstrates the same level of narrow-minded discriminatory assumptions that the MMTC Comments ascribe to the broadcast industry. The comments of the broadcast industry do not ask for relief from compliance with civil rights laws; instead the industry merely supports proposals to ease the current reporting and record keeping requirements and forfeitures that are collateral (and possibly detrimental) to the goal of ending employment discrimination.

A. The Statistics Relied On By MMTC Demonstrate the Broadcast Industry's Commitment to Equal Employment Opportunity

It is telling that the employment statistics relied on by MMTC in its Comments fail to show any systemic discrimination against women and minorities in the broadcast industry. According to statistics compiled by MMTC, employment of minorities and women in full-time broadcast professional capacities has grown dramatically from 1971 to 1995. In 1995, minorities accounted for 18.6% of broadcast professionals in 1995, up from 8.0% in 1971 and 13.4% in 1980.<sup>4</sup> As a

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<sup>3</sup> MMTC Comments at 171 (citing a 1978 argument of an attorney that without affirmative action, educational institutions would discriminate). MMTC makes similar remarks throughout its comments. For instance, at page 179 of comments, MMTC asserts, without evidence: "Without that constant reminder [provided by record keeping and reporting requirements], many broadcasters who no longer discriminate will drift back into the practice again. Some who never discriminated will begin to do so for the first time." And at page 59, MMTC makes the following ridiculous assertion: "The diseases of bigotry and intolerance have spread at an alarming rate, becoming the national symbols of the radio industry." Further MMTC finds that a low rate of findings of cause to prosecute discrimination by the EEOC is not evidence that broadcasters are making progress against racism, but evidence that "discriminators" are finding ways to conceal their bigoted conspiracies. MMTC Comments at 76.

<sup>4</sup> MMTC Comments at 36. The Commission's 1995 employment report summary indicates that minority employment in broadcasting was 19.7% and female employment was

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percentage of the overall United States workforce, the representation of minorities (blacks and hispanics) rose from 15% in 1980 to 20% in 1994.<sup>5</sup> Of minorities in general, representation was 24.6% in 1995.<sup>6</sup> Thus, the representation of minorities in the broadcast industry has increased at a rate similar to that of the entire American workforce, professional and nonprofessional alike. Moreover, as pointed out by the NAB, the growth of minorities and women in the broadcasting industry exceeds the growth in representation in the general workforce.<sup>7</sup> Likewise, the percentage of broadcast professionals who are women dramatically increased from 10.2% in 1971 to 34.5% in 1995. Such significant increases in *professional* employment of women and minorities belies the notion that institutional discrimination is practiced in the broadcast industry.<sup>8</sup>

Further, MMTC's employment statistics demonstrate that at all employment levels of broadcasting minorities and women are nearing parity with respect to their representation in the local labor force.<sup>9</sup> In fact, minorities and women have significantly exceeded parity among office and

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40.7%. NAB at 8.

<sup>5</sup> STATISTICAL ABSTRACT OF THE UNITED STATES at 399 (1995).

<sup>6</sup> NAB at 8.

<sup>7</sup> *Id.*

<sup>8</sup> This is not to argue that discrimination in broadcasting, or any industry, has been eradicated. The point is that broadcasting, as an industry, has not been shown to be discriminatory.

<sup>9</sup> MMTC Comments at 38.

clerical staff, and the NCAB and VAB support MMTC's proposal to eliminate the reporting and record keeping requirements as to those positions.<sup>10</sup>

B. The Comments Of Broadcasters Confirm That EEO Requirements  
Are An Excessive Administrative Burden On Small Broadcasters

The comments submitted by the broadcast industry are striking in their consistency. They uniformly confirm that the FCC's current EEO Rule imposes enormous costs and inefficiencies on the broadcast industry.<sup>11</sup> Most commenters support the Associations' assertion that the FCC's policy celebrates style over substance by focusing on "efforts" rather than whether the broadcaster is acting in a fair and nondiscriminatory manner.<sup>12</sup> Many cited the perverse result that broadcasters can achieve the goal of a diverse, integrated staff and yet have a forfeiture imposed against them for failing to dot all the "i's" and cross all the "t's."

The broadcasters' comments confirm that complying with the EEO Rule is a procedural nightmare, requiring documentation of every stage of the hiring process, from listing referral sources to documenting interviews to maintaining records and memories of every hiring decision and the reasons behind them for the length of the license term. The Named State Broadcasters Associations'

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<sup>10</sup> It is interesting to note that women and minorities exceed parity in office and clerical positions to a greater extent than they are under-represented in other positions. Likewise, women exceed parity in sales positions.

<sup>11</sup> See TAB Comments at 16; Montana Communications, Inc. Comments at 29-30; Walker County Communications, Inc. Comments at 7-9.

<sup>12</sup> See CBS Comments at 4; Named State Broadcasters Comments at 4-5.

Comments outline 21 discreet steps in this process — all requiring extensive staff time and documentation.<sup>13</sup>

While MMTC reviewed broadcasters in Tennessee, it did not look at the burden and cost of the EEO Rule's current requirements. Other commenters specified how the EEO Rule affects them. According to the Texas Association of Broadcasters, compliance with the current EEO Rule cost their state's broadcasting industry \$12.3 million in 1994.<sup>14</sup> This is money that could have been better used to further the goals of EEO. It could have been used to purchase or produce programming of a diverse character, to recruit women and minorities, or to add staff, thereby furthering each station's service to its respective community.

Likewise, the Montana Broadcaster's Association focused its inquiry on the Commission's concern about what burdens are caused by the EEO Rule.<sup>15</sup> In a survey of 41 broadcasters representing a cross section of radio and television markets and staff sizes (excluding stations under 5 employees) conducted by Haley, Bader & Potts,<sup>16</sup> the Montana Broadcaster's Association reported that an average of 165 hours per year was spent on EEO duties.<sup>17</sup> Of the various EEO duties,

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<sup>13</sup> Named State Broadcasters Comments at 5-6.

<sup>14</sup> TAB Comments at 16.

<sup>15</sup> Comments of Montana Broadcaster's Association and Haley, Bader & Potts ("Montana Broadcaster's Association") at 27.

<sup>16</sup> Montana Broadcaster's Association Comments at 28.

<sup>17</sup> *Id.* at 29.

broadcasters reported that the record keeping was most onerous.<sup>18</sup> That time could be cut significantly -- up to 75% -- if the record keeping requirements were eliminated.<sup>19</sup>

As other parties have noted, the original EEO Rule was not "remedial" in nature and was not intended to address actual discrimination occurring in the broadcast industry at large, but instead was merely intended to address actual instances of discrimination by an individual licensee. By balancing the lack of evidence of more than incidental and rare cases of discrimination in the industry versus the immense expenditure of time and resources required of every broadcaster, regardless of their history, it becomes self-evident that the FCC's EEO Rule imposes burdens which are disproportionate to the benefits achieved. As MMTC notes in its joint comments, only in three instances in the last 25 years has the FCC made a finding of actual discrimination in connection with license renewals.<sup>20</sup>

Because of the administrative requirements of the FCC Rule, the recruiting and hiring process takes considerably longer than it would if the mechanical steps mandated by the rules were not required. As noted by other parties, a broadcaster may have the perfect minority female candidate available for hire at the time a job is vacated. However, the broadcaster cannot hire that person immediately because it must jump through all the EEO Rule's procedural hoops to obtain an appropriate pool of applicants and to prove it was recruiting minorities and women.<sup>21</sup> By the time

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> MMTC Comments at 217 n. 261.

<sup>21</sup> See Walker County Communications Comments at 9; NAB Comments at 12 (citing the experience of KXKZ-FM and WOWK-TV).

the applicant pool is established and interviews are conducted, that perfect candidate may well have taken a job elsewhere. Because of this problem, the Associations agree with Walker County Communications, Inc. that broadcasters should only be required to hold open a job for a limited amount of time while trying to achieve an appropriate applicant pool.<sup>22</sup> The problem of the time consuming applicant pool process is compounded by the high turnover rate of many small broadcasters.<sup>23</sup> Thus, the laborious record keeping requirements come into play most often for those broadcasters who can least afford it.

Additionally, in small markets, some small stations may have difficulty recruiting minorities at all.<sup>24</sup> Small market stations continually lose qualified minority candidates to stations in larger markets. For instance, on the fringe of the Houston, Texas MSA is the town of Huntsville. Broadcasters in Huntsville must compete with Houston's economy for employees.<sup>25</sup> Thus, a broadcaster in tiny Huntsville may not be able to compete for the much sought after minority candidates. While trying to go through all of the appropriate steps, small broadcasters must go understaffed.

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<sup>22</sup> Walker County Communications Comments at 10.

<sup>23</sup> MMTC Comments at 51; California-Minnesota-Missouri-North Dakota Comments at 7.

<sup>24</sup> Walker County Communications Comments at 4.

<sup>25</sup> *Id.*

C. The Associations' Proposals for Modification of the EEO Rule Are Overwhelmingly Supported By Other Commenting Parties

The Associations, as well as the other parties, applaud the FCC's efforts to streamline the administrative and record-keeping requirements of the EEO Rule. Further, most all commenters agree that substantial exemptions should be granted for small broadcasters, small market broadcasters, and broadcasters meeting certain guidelines.

1. Exemption from EEO Reporting and Record Keeping Requirements Should Be Extended to a Broader Class of Broadcast Station

The Associations advocate that the FCC extend relief from the EEO reporting and record keeping requirements to all broadcast stations with twenty-five (25) or fewer full-time employees. Most commenting parties recommend that the threshold for this exemption be raised. The following broadcast associations and licensees support raising the reporting threshold to twenty (20) or fewer full-time employees: National Association of Broadcasters ("NAB"), Walker County Communications, Inc., Broadcasters Associations of California, Minnesota and Missouri, and the Named State Broadcasters' Associations (including Alabama, Arizona, Connecticut, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland/D.C./Delaware, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin).<sup>26</sup> The Texas Association of Broadcasters advocate an increase to fifteen (15) or fewer, and the Montana Broadcaster's Association suggest a threshold of ten (10) employees. However, in a survey of broadcasters throughout the country, Haley, Bader & Potts reported that most broadcasters support an exemption

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<sup>26</sup> Filing as the Named State Broadcasters Associations.



for stations with between 20 to 50 employees.<sup>27</sup> Therefore, the vast majority of state broadcasters associations recommend raising the exemption level to at least 20 or fewer employees.

NCAB and VAB recommend a reporting threshold of twenty-five (25) or fewer employees because of the reality of employment patterns in the broadcast industry. Reporting requirements should be reserved for only the largest broadcaster employers because in smaller stations, turnover is still high and the need to fill vacancies quickly is great because employees are spread out over many duties, such as on-air, marketing, sales, promotions, clerical, management, engineering, etc.<sup>28</sup> No single department will employ many people, and one less person for any length of time in any job category will have an adverse effect on the station. The adversity is compounded by the length of time spent recruiting the proper applicant pool and assigning much-needed staff to the record keeping and recruiting responsibilities of the current EEO Rule. Thus, the experience of the Associations compels the recommendation of a twenty-five (25) or less full-time employee exemption.

Radio stations that wish to operate with few employees can automate their stations and avoid needless and repetitive paperwork burden. For a station which desires to broadcast "live" and maintain a news department, the FCC Rule imposes a substantial cost. Thus, if the FCC wishes to promote broadcast employment and the broadcast of news and public affairs programming, it should not allow its rules to impose a cost on radio stations that desire to do so.

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<sup>27</sup> Montana Broadcaster's Association Comments at 28.

<sup>28</sup> See, e.g. MMTC Comments at 51.

The focus of MMTC is misplaced in this area. The MMTC Comments argue that increasing the staff size exemption to 20 employees would increase the number of stations exempt from certain paperwork requirements. As an example, MMTC states that 70% of Tennessee stations would be exempt if staff size is set at 20.<sup>29</sup> This example does nothing more than demonstrate that, at least in Tennessee, there are a large number of small broadcasters. Nonetheless, at a 20 employee threshold level, 72.3% of total employees in the U.S. broadcast industry would still be covered.<sup>30</sup> MMTC's statistics prove the point. If seventy percent of small broadcast stations could be relieved of this expensive and time consuming administrative nightmare, while still protecting more than 70% of all employees at broadcast stations, that should be done. After all, employees are the intended beneficiary of the rule, not licensees. Further, elimination of the record keeping expense on small broadcasters may make additional revenues available for staff or for training, thereby providing greater opportunities for women and minorities.

MMTC recommends that staff size be calculated by hours or months worked.<sup>31</sup> The purpose of this calculation is to give some credit to broadcasters for part-time employees.<sup>32</sup> The Associations agree that credit for part-time employees is appropriate. However, MMTC's approach will only serve to increase the record keeping burden on broadcasters by forcing hourly records to be kept, compiled and reported. Therefore, the proposed "person-month" is contrary to the purpose of this

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<sup>29</sup> MMTC Comments at p. 191.

<sup>30</sup> California - Minnesota - Missouri - North Dakota Broadcasters Associations Comments at p. 12.

<sup>31</sup> MMTC Comments at 323.

<sup>32</sup> *Id.*

rule making -- to streamlining the rules. It should be noted that the benchmark levels for exemption suggested by MMTC under its "person-month" plan may increase the number of full-time employees that an exempt station might have. Setting the exemption level at 80 person-months<sup>33</sup> would allow a station with 6 2/3 full-time employees to be exempt. While the Associations applaud MMTC's proposal to allow wider exemptions based on staff size, MMTC's proposal, while increasing the record keeping burden on broadcasters would also have the effect of hurting some small broadcasters of 5 or less full-time employees by stripping them of their exemption. If an exempt station of 5 full-time personnel also employed 4 employees at 20 hours per week, the station would expend 84 person-months and not be exempt under MMTC's proposal.

2. Many Commenters Urged the Commission to Expand the Labor Force Threshold and to Permit the Use of Alternative Labor Force Measurements

The Associations assert along with other parties that the FCC's focus on MSA labor force data mischaracterizes the effective labor pool for many stations. Many commenters propose allowing stations to show that their EEO performance should be based on a labor force consisting of less than the entire MSA or including areas outside of the MSA. Very often, all areas of an MSA are not as accessible to other areas, because of traffic, lack of public transportation, or a general opinion of local citizens of the distinct separation between communities within an MSA. Therefore, many commenters agree that the FCC should reform its rules to recognize that recruitment efforts directed to the whole MSA may often fall on deaf ears.

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<sup>33</sup> *Id.* at 194 n. 231.

As Walker County Communications points out, it is difficult for the small town of Huntsville, Texas to attract employees from Metropolitan Houston.<sup>34</sup> As CBS, Inc. noted, broadcasters in the Miami, Florida MSA draw employees from nearby Broward County where 40% of the station's viewers reside.<sup>35</sup> This makes the FCC's use of Dade County's majority-minority labor force an inappropriate baseline when employees are attracted from Broward County, which is only 25.3% minority.

Thus, the Associations recommend that the FCC's three-part test for determining whether to allow a station to use a labor force measure besides the MSA should be a disjunctive test (rather than the current conjunctive test) in recognition of the flexible size of areas of potential employees. Under the elements of the test, it is clear that if minority populations are too far from the station, that alone may be sufficient to prevent minorities from considering opportunities at a station. Secondly, the inability to easily commute because of the traffic or a lack of public transportation may be, alone, sufficient to stifle the interests of people in whole areas from being interested in working at a station. Allowing use of alternative data when any of the elements of the three-part test are met more fully reflects the actual available labor force for broadcast stations.

The Associations believe that the proposal of the California, Minnesota, Missouri, and North Dakota Broadcasters Associations in regard to this issue has merit. These associations recommend that the Commission consider the number of qualified minorities in the labor force, rather than the

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<sup>34</sup> Walker County Communications, Inc. Comments at 4.

<sup>35</sup> CBS, Inc. Comments at 20.

total number of minorities when determining whether a station has met the guidelines.<sup>36</sup> This is especially relevant when evaluating the available labor force for the "upper four" positions. Although for purposes of determining parity the Commission looks to the total minority population in the area, it must be considered that "upper four" positions require advanced training or technical skills.<sup>37</sup> Thus, it may be that for some stations the effective minority labor force is smaller than the percentage of total minorities in the area.

NCAB and VAB also agree with the argument that stations on the fringe of an MSA should receive relief because it is difficult to recruit minorities who may live in the interior of an MSA and who are often unwilling or unable to commute or relocate to the small or fringe market station.<sup>38</sup> NCAB and VAB also support, in the alternative, the Texas Association of Broadcasters' and NAB's recommendation that a station's principal community contour be used as the basis for determining the available labor force.<sup>39</sup> If the contour were used instead of the MSA, then the disjunctive three-part test above should be used to recognize situations where it is difficult to impossible to interest minorities in employment at a station, or where the station's signal does not reach the entire MSA.

NCAB and VAB also advocate an increase in the 5 percent threshold for minority population in the available labor force for reporting and record keeping. That threshold should be raised to ten percent. As noted by the Associations, as well as other commenters, this would be a level which

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<sup>36</sup> California - Minnesota - Missouri - North Dakota Broadcasters Association Comments at p. 2, 3. See also TAB Comments at 11.

<sup>37</sup> California - Minnesota - Missouri - North Dakota Broadcasters Association Comments at 3 n. 7.

<sup>38</sup> Walker County Communications Comments at 4.

<sup>39</sup> TAB Comments at 4; NAB Comments at 19.

would insure the practical availability of a minority labor force. The Associations agree that residents of the MSA who are unavailable for employment (e.g., incarcerated),<sup>40</sup> transient (migrant workers), or cannot speak English should not be considered in determining the percentages of minorities in the labor force.<sup>41</sup>

3. Credit for Establishing Internship, Training Programs, and Participation in State or Nationally Approved Job Fairs

Many commenters assert that credit should be given broadcasters for placing minorities and women in internships.<sup>42</sup> Some suggest that part-time positions should be considered, because, as EZ Communications notes, societal change caused by corporate downsizing and two-income families have made part-time employment more attractive.<sup>43</sup> Part-time positions and internships are often instrumental in helping people get a foot in the door, and are a helpful way to give women and minorities the experience necessary to land a full-time job, or be promoted to one when an opening occurs.<sup>44</sup> At some stations, the position of Production Assistant is an entry level job, and is often part-time. A promotion means becoming full-time. The Associations' original comments proposed that qualified internship or training programs should consist of the following elements:

- (1) A systematic program geared toward the professional development of participants in the broadcast industry which teaches participants basic

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<sup>40</sup> Walker County Communications Comments at 7.

<sup>41</sup> Walker County Communications Comments at 6.

<sup>42</sup> See for example MMTC Comments at 40, 120 (recognizing the importance of training programs for minorities); TAB Comments at 6.

<sup>43</sup> EZ Communications, Inc. Comments at 3.

<sup>44</sup> See Walker County Communications Comments at 6; MMTC Comments at 40, 120; HB&P Comments at 32 (70% of surveyed broadcasters offer internship programs).

skill necessary for broadcast positions and emphasize hands-on experience and training, under the supervision of trained employees; and

- (2) The program must last for at least one school semester.

This proposal will help all prospective broadcast employees get the training they need and will particularly assist untrained minority candidates who otherwise might not get an opportunity at broadcast employment.<sup>45</sup> With the proposed internship, broadcasters will be able to receive credit for training minorities for future careers in broadcasting, a positive result for the person learning new skills as well as the broadcast station attempting to satisfy its EEO obligations.

4. Scope of the Proposed Exemption

Many commenting parties agree that the exemption from reporting and record keeping requirements would result in required filing only of the first page of Forms 395-B and 396-A and the first two pages of Form 396, which would be a certification of qualification for exemption.

Although exempted, ample protection against discrimination still exists under the Title VII of the Civil Rights Act of 1964<sup>46</sup> and through other FCC rules requiring the broadcaster to (1) maintain an EEO program, (2) disseminate that program to job applicants and existing employees, (3) use minority organizations, media, educational institutions, and other potential sources of minority and female applicants when they are fruitful as often as practically possible, (4) evaluate employment profile and job turnover against the availability of minority employees in the stations'

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<sup>45</sup> An argument MMTC calls a "stereotype" of minorities. MMTC Comments at 271.

<sup>46</sup> MMTC, however, seems to discount the existence of effectiveness of the Civil Rights Act by saying the current EEO Rule provides "the only meaningful protections against discrimination in broadcasting...." MMTC Comments at 155.

recruitment area, and (5) offer employment and promotions to qualified minorities in a nondiscriminatory fashion.

The Associations support the recommendation of other commenting parties that would empower the FCC to prospectively require reporting and record keeping upon a finding of discrimination after a license renewal challenge.

5. The Proposed Forfeiture Policy Should Be Rejected

The Associations support the proposals of other commenting parties that the imposition of a forfeiture for a first-time record keeping or reporting violation is unreasonable and that a warning should be issued instead.<sup>47</sup> Also, the Associations support the elimination of any forfeiture for a reporting or record keeping violation when the station is found to have achieved parity in its female and minority employment. In this case, the FCC's stated goal of achieving diversity is better served by providing a better link between penalties and the governmental interests at issue.

Further, the Associations support an elimination of forfeitures for failure to achieve an adequate applicant pool in areas with less than 10 percent minorities in the available labor pool. In addition, the Associations note that setting specific numbers for the applicant pool and tying forfeitures to those percentages creates a *de facto* quota. Quotas have been rejected by the U.S. Supreme Court.<sup>48</sup> Further, the Associations support the NAB's proposal of a sliding scale approach to forfeitures, under which the failure to report or keep records would be covered with the station's

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<sup>47</sup> TAB Comments at 12.

<sup>48</sup> As the National Association of Broadcasters said: "The forfeiture scheme is much too concerned with the process of recruitment, providing little recognition for those stations that have achieved, or nearly achieved, the goal of any affirmative action program . . . the hiring of women and minorities." NAB Comments at 3.



level of parity.<sup>49</sup> In the alternative, the Associations support the Montana Broadcaster's Association's proposal that recruitment and referral violations be penalized without forfeitures.<sup>50</sup> By removing the focus from bureaucratic requirements, the Commission and licensees can better focus their efforts on achieving parity and stamping out discrimination.

Further, many commenting parties agree with the Associations' conclusion that the proposed forfeiture guidelines are unacceptably vague, and, therefore, violative of broadcasters' constitutional rights to due process. Many parties agree that the guidelines, if approved, must contain a specifically tailored definitional section to explain the meanings of all terms, especially "adequate pool."<sup>51</sup> Under the proposed guidelines, broadcasters are faced with unanswerable questions such as: Does the term mean the pool of applicants for all jobs combined over the license term, or for each individual job opening? What is "adequate?" Without explicit definitions of these terms, broadcasters have no way of knowing how to avoid being assessed monetary penalties.

### III. CONCLUSION

For the reasons expressed herein, NCAB and VAB believe that the record on this proceeding demonstrates that the Commission's EEO Rule is ripe for substantial revision. The current record keeping obligations imposed by the Rule are inordinately burdensome on small broadcasters. The experience of such broadcasters is that the benefits of the record keeping requirements are greatly outweighed by its detriments. Accordingly, small broadcasters should be afforded relief from these

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<sup>49</sup> *Id.* at 14.

<sup>50</sup> Montana Broadcaster's Association Comments at 25.

<sup>51</sup> *Id.* at 21.